



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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October 27, 2016

Mr. Mark Woolley
District Director for Congressman Zeldin
31 Oak Street, Suite 20
Patchogue, NY 11772

MARK
Mr. Woolley:

Please accept my appreciation for hosting a meeting at your office on September 28, 2016, to explore options for managing off-road vehicle use within Smith Point County Park as it relates to the avoidance of take of the Federally protected piping plover (*Charadrius melodius*; threatened). I felt that there was a productive discussion that identified the issues, legal authorities, and agency missions of those in attendance.

The goal of the meeting was to explore options that might be available to Suffolk County Parks to more flexibly manage off-road vehicle driving and be within compliance of provisions of the Endangered Species Act of 1973 as amended (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq). To that end, we identified and enclosed several options for consideration.

We stand ready to provide further assistance should Suffolk County Parks decide to pursue these options.

Sincerely,

David A. Stilwell
Field Supervisor

Enclosure

Outline of potential next steps, subject to further coordination, to provide more management flexibility for off-road vehicle driving at Smith Point County Park – Follow up from the September 28, 2016, meeting in Congressman Zeldin's Office.

I. Issue:

- a. Recreational beach driving at Smith Point County Park during the breeding season of the piping plover may cause take of plovers unless restrictions are applied. The County has issued permits to the public for beach driving during the summer breeding season. Some permittees have expressed concern because they are restricted from beach driving when unfledged chicks are on the beach.
- b. Section 9 of the ESA, states that "...with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to ...(B) take any such species within the United States or the territorial sea of the United States (ESA: Sec. 9(a)(1)-(B))."
- c. Take is further defined by regulations (50 CFR Section 17.3) to include harass and harm. Harass is defined as ".....an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."
- d. Harm is defined as an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including feeding, breeding, or sheltering (50 CFR 17.3).
- e. The ESA does not provide for a de minimus amount of take. By law, all take must be authorized prior to its occurrence. Section 7 of the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service (Service) if their actions may affect a listed species. While the U.S. Army Corps of Engineers (Corps) has consulted with the Service regarding beach renourishment projects, County permitted activities are not covered under the Corps consultation.

II. Current Conditions

- a. The County, at times, restricts beach driving, in some, or all of the park, during plover season in order to comply with the plover guidelines. These guidelines have been developed in order to assist landowners or managers to avoid take of plovers in the absence of take authorization pursuant to Section 7 or Section 10 of the ESA.

III. Potential Solution: As discussed at our meeting, the following options were discussed for potential follow up and action:

- a. Avoid take of plovers – status quo
 - i. Maintain the status quo by following the guidelines and restricting beach driving, as appropriate, during plover season or;
- b. The following actions are to be linked. An escort system, properly designed to avoid take, is implemented while a Habitat Conservation Plan is developed to afford more long-term management flexibility.

i. Habitat Management

1. Approve and facilitate implementation of all habitat maintenance and restoration activities as required under the Corps "Fire Island Inlet to Moriches Inlet Stabilization Project" (FIMI) from Pattersquash to Great Gun Beach. These projects were intended to provide habitat on the bayside of Fire Island and may increase the probability that chicks remain on bayside habitats and not seek to move to the oceanside;
2. As per the FIMI, adequately sign and symbolically fence all plover breeding areas and submit a symbolic fencing plan to the Service;
3. Restrict pedestrian activities and dog walking on the bayside so as to limit disturbance to adults and chicks which may force them to flee to the ocean side.

ii. Escort System – Is developed to avoid take by allowing beach driving under the following conditions:

1. Direct traffic to Burma Road as much as possible to avoid disturbance to adults and broods on the oceanside.
2. Use of a daytime only escort system with experienced monitors and increased law enforcement.
3. Elements of the temporary escort program include logistics of the escort operation, enforcement, monitoring, and management. Specific details of these elements will have to be developed by/with Suffolk County Parks, but factors to consider are listed as follows:

Escorts

- a. It is recommended that the escort program be implemented only when there are a limited number of broods with unfledged chicks remaining in the park, where monitoring of the broods would be manageable and "take" can be avoided.
- b. Each monitor and escort must be familiar with plover biology and identification, and attend the Service/New York State Department of Environmental Conservation instructed Steward Training workshop, and be supervised by an experienced crew leader.
- c. Vehicle escorting should begin at an agreed upon distance from the closest chick and terminate that same distance past the last chick in a given brood. Escorts should be in constant communication with the plover monitors. Escorts should temporarily halt traffic for chicks approaching the travel corridor.
- d. Off-road vehicle (ORV) travel should be restricted to daylight period of the day when the monitors can account for all chicks.

Enforcement

- a. Enforcement of buffers, vehicle routes, and parking areas will be essential in ensuring that take is avoided. The

purpose of law enforcement is to avoid the risk of disturbance, harassment, or mortality of piping plovers resulting from ORV traffic and associated recreational activities.

Management

- a. Measures should include outreach and education of ORV users.
- b. Any vehicle ruts present in corridors through brood rearing areas should be smoothed out after the vehicle(s) have passed (coordinate on protocols) to facilitate brood movements.

Monitoring

- a. Compliance and effectiveness monitoring will be important in assessing the program's success and performance, as well as avoiding take.
 4. Should take occur, the escort system will be suspended until it can be determined if future take can be avoided by modification of the escort system.
- iii. Section 10 of the ESA allows non-federal landowners or other entities to develop conservation plans that, if approved, allow the Service to issue an Incidental Take Permit (ITP) for a limited amount of take. Having provision for incidental take will provide the County with greater management flexibility. In addition, the Habitat Conservation Plan (HCP)/ITP has No Surprises Assurances (50 CFR 17.22(5)). In simple terms, the No Surprises Assurances means the Service will not require additional obligations of lands or resources in the future if the HCP is implemented as agreed.

The following provides information on the Section 10 process:

- i. In order for a conservation plan to be approved it must:
 1. Contain the following components (ESA: Sec. 10(a)(2)(A)):
 - a. The impact which will likely result from such taking;
 - b. What steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
 - c. What alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
 - d. Such other measures that the Secretary (of the Interior) may require as being necessary or appropriate.... (e.g., monitoring, annual reporting, etc.).
 2. Meet the following issuance criteria (ESA: Sec. 10(a)(2)(B)):
 - a. The taking will be incidental;

- b. The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- c. The applicant will ensure that adequate funding for the plan will be provided;
- d. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- e. The measures, if any, required (by the Secretary) will be met....

Figure 1. Generalized List of Tasks and Responsible Parties

Task	Responsible Party
Develop draft HCP	Applicant and/or HCP Consultant, with input from the Service
Draft Implementing Agreement (if applicable)	Applicant and Service
Draft NEPA document	Service/NEPA Consultant
Cultural Resources report	Service, with input from Applicant
Federal Register notice	Service
Biological Opinion	Service
Final NEPA document	Service/NEPA Consultant
Final HCP	Applicant and/or HCP Consultant
Final IA	Applicant and Service
Section 10 Findings Statement	Service
NEPA Decision document	Service
Final Decision Package/ITP	Service